COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss

SUPERIOR COURT
BACR1995-46579

COMMONWEALTH

V.

EMORY SNELL

COMMONWEALTH'S OPPOSITION
TO THE DEFENDANT'S THIRD MOTION FOR A NEW TRIAL

Now comes the Commonwealth through its District Attorney Michael D. O'Keefe and opposes the defendant's third motion for a new trial in this matter. It is the defendant's fourth time overall in state proceedings, challenging his conviction. The defendant's immediate motion, virtually a rehashing of issues previously addressed multiple times at the Supreme Judicial Court and the Superior Court, is not a prudent use of judicial resources.

The defendant's affidavits allege that the evidence does not support suffocation, and allege a coronary issue. The Supreme Judicial Court held in its opinion, "The medical examiner's opinion as to the cause of death was supported by independent medical evidence of injuries to the victim, all which excluded

any probability of death by natural causes including cardiac arrhythmia." *Commonwealth v. Snell,* 428 Mass. 766, 771 (1999).

The defendant already received the plenary review from the Supreme Judicial Court pursuant to G.L. c. 278, §33. Although a motion for a new trial allows for a new trial at any time, relief is limited to cases where it appears that justice may not have been done. *Commonwealth v. Robbins,* 431 Mass. 442, 444 (2000) (further citations omitted); *see also Commonwealth v. Lopez,* 426 Mass. 657, 662 (1998) (further citations and footnote omitted). As reasons for its opposition, the Commonwealth submits the following memorandum.

PRIOR PROCEEDINGS

1. The defendant Emory Snell, Jr. was indicted on April 19, 1995 for the first-degree murder of his wife, Elizabeth Lee (A/4-5). A jury trial was held in Barnstable Superior Court from August 21, 1995 - September 1, 1995 (Travers, J.) (A/1). The defendant was convicted of first-degree murder (by deliberate premeditation) on September 1, 1995 (A/5).

2. In November, 1996, the defendant's direct appeal was stayed in order for him to pursue a motion for a new trial (A/6). The defendant filed his motion in

the trial court in October, 1997 (A/6). In February, 1998, the defendant's motion for a new trial was denied without a hearing (Travers, J.) (A/6). A motion to reconsider the denial of the motion for a new trial was also denied without a hearing (Travers, J.) (A/6). The appeal of the denial of the motion for a new trial was consolidated with the direct appeal (A/6-7).

3. The defendant's conviction was affirmed by the Supreme Judicial Court on February 2, 1999. *Commonwealth v Snell*, 428 Mass. 766 (1999) (Greaney, J.) (B/1-12)(A/7).

4. On December 20, 1999, the defendant filed a pro se Motion for Release from Unlawful Confinement Rule 30(a) or, Alternatively, New Trial Rule 30(b) (A/7). This second motion was denied March 16, 2000 (Connon, J.)(A/7). The defendant filed a Notice of Appeal on March 21, 2000 (A/7).

5. The defendant filed his Motion for Leave to Be Heard on Timely Filed Appeal from Denial of Rule 30(a) &(b) New Trial Motion on October 5, 2001. This appeal of the denial of his motion for a new trial was denied by a Single Justice of the Supreme Judicial Court on July 26, 2002 (Spina, J.) (A/7).

6. On August 29, 2011, the defendant filed a motion for expert funds to retain an expert pathologist and a meteorologist (A/7). The defendant filed a renewed Motion to Permit Funds for Forensic Experts on September 16, 2011 (A/8). On February 10, 2012, this renewed motion was denied without prejudice, to renew, following expected filing of Rule 30 Motion.

7. On September 13, 2012, the defendant filed his Motion for Enlargement of 2005 Discovery Order to Include Personnel File (A/8). The Commonwealth was given 30 days to file an opposition (A/8).

8. On October 25, 2012, the Commonwealth filed an opposition to the defendant's Motion for Enlargement of Discovery Order (A/8).

9. On December 13, 2012, the defendant filed a third motion for a new trial. (A/8)

10. In August of 2015, the defendant's motion was denied. (A/9)

11. Between the years of 2013 and 2016 the defendant filed various pro se motions in the trial court, all of which were denied. (A/9)

12. In December of 2017, the defendant filed the immediate motion for a new trial. (A/11)

STATEMENT OF TRIAL FACTS[1]

Statement of Trial Facts

On March 16, 1995, at approximately 7:27 p.m., the victim Elizabeth Lee Snell obtained a restraining order against the defendant, her husband Emory Snell (Tr. 237). At the same time Barnstable police officer John Campbell obtained an arrest warrant for the defendant, charging him with threats to commit the crime of arson and murder (Tr. 238). The defendant and victim resided together at home at 1051 Putnam Avenue Extension, Marstons Mills. (Tr. 248-249).

Campbell and other Barnstable police officers arrived at the defendant's and the victim's home at approximately 9 p.m. (Tr. 240). As part of attempting to get the defendant's attention the police called the defendant's and victims home (Tr. 243-244). The police could hear the phone ringing inside the house, but there was no response (Tr. 244). The victim also returned to the home at the same time the police were there and supplied a key (Tr. 245, 251-252).

The police entered the house and located the defendant sleeping in the bedroom (Tr. 246). When

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[1] A CD copy of the trial transcript accompanies only the Commonwealth's Opposition submitted to the motion judge.

advised that he was under arrest, the defendant responded, "This is fucking bullshit" (Tr. 247). During the booking, the defendant told the police officer that all the victim's statements were false, and that everything was made up (Tr. 256). The defendant told the police that the victim did not work, and that when she needed money, she made up lies to get the defendant in trouble (Tr. 258). The defendant was arrested at approximately 9:15 p.m.; he paid $100 cash bail, and then was bailed at 10:05 p.m. (Tr. 278, 286).

The night of March 16, 1995, the defendant checked into a local hotel, paying cash for one night's stay (Tr. 434-435). Although the defendant's checkout card had a time of 7:56 a.m., on March 17, 1995, this time did not reflect the time the defendant checked out (Tr. 443). This time was generated by the computer as the time the defendant was checked out of the computer, and did not necessarily reflect the time the defendant actually checked out (Tr. 447-448). The defendant could have left the hotel, or checked out at any time (Tr. 448-449).

The morning of March 17, 1995, at approximately 6:10 - 6:15 a.m., Robert Rozen, a neighbor of the

victim's and defendant's, saw the defendant's truck parked in front of his house (Tr. 6/59). He did not see the defendant at this time (Tr. 6/63).

Rozen's daily routine was to walk his dog in the neighborhood at this time of the morning (Tr. 6/57). He knew it was March 17th because it was his 49th wedding anniversary, and his wife had a doctor's appointment that morning[2] (Tr. 6/56-57).

As Rozen walked past the Dunkin Donuts store he heard the defendant's truck start up (Tr. 6/65). He was startled by this, because he was not accustomed to hearing the defendant's truck start up that early (Tr. 6/65). The truck came directly at Rozen (Tr. 6/87). The defendant was driving the truck (Tr. 6/66).

Because he was surprised to see the truck, Rozen watched the defendant drive out of sight down Putnam Avenue (Tr. 6/66). Rozen noted the time on the clock in the Dunkin' Donuts store as 6:28 a.m. - not quite 6:30 a.m.[3] (Tr. 6/77).

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[2] Records from the doctor's office confirming an appointment that morning were entered into evidence (Tr. 6/121-125).

[3] Although the defendant did not testify at trial, during the motion to suppress statements he testified under oath that he had been present at the Putnam Avenue house between 6:00 a.m. and 6:30 a.m., and picked up his truck at that time (P.T. Tr. V/324).

The direction of the truck also drew Rozen's attention, because he had never seen the defendant leave the house that early or use that route to leave the house (Tr. 6/67). The defendant would always turned torward Route 28, rather than drive down Putnam Avenue (Tr. 6/67). The defendant also usually left later in the morning, not as early as 6:30 a.m. (Tr. 98).

During the day of March 17th, the defendant was seen in the Barnstable District Court by several people (Tr. 580, 583, 5860. The defendant met one of his employees at approximately 11:00 a.m. and paid the man his wages (Tr. 615, 619-620).

At approximately noontime, the defendant then spoke with Gary Duffy at Duffy's home (Tr. 501). The defendant was calm during this conversation (Tr. 502). The defendant told Duffy that he felt that the court system caused a major problem between a husband and a wife (Tr. 503). The defendant said that he put the victim up on a pedestal after he married her, and he did not want her working two jobs (Tr. 524). The defendant said that when a couple is having a conflict, it escalates, and that the night before, the victim and the defendant had gotten to a point where

they were not trying to resolve the problem, so he left (Tr. 518). The defendant said that after he left the house, the victim called the police (Tr. 518).

The afternoon of March 17th at approximately 4:15 p.m., the defendant entered the Clerk's Office in the Barnstable District Court seeking to have the restraining order against him removed (Tr. 608). The defendant told the assistant clerk that he had been in court all day, and that it had been a misunderstanding (Tr. 608). The defendant was requesting documentation showing that the restraining order had been lifted (Tr. 608). The defendant's demeanor was described as "determined" (Tr. 608).

The victim's daughter, Susanna Lee, last spoke with the victim on Wednesday, March 15, 1995 (Tr. 6/184). Susanne tried calling her mother that afternoon, but only got the answering machine (Tr. 6/185). She tried to call the victim around 10:00 p.m. on March 16, 1995, but the phone only rang continuously, and the answering machine did not pick up (Tr. 6/185-186). Susanne tried to call her mother on March 17th, but the phone just continued to ring (Tr. 6/186). Susanne called her brother Bruce Lee and other relatives (Tr. 6/187).

Susanne also had no success in attempting to contact the victim on Saturday, March 18th (Tr. 6/188). The phone continued to ring and the answering machine did not pick up (Tr. 6/188). After speaking with family members on March 18th, Susanne called the police (Tr. 6/188). Susanne was unaware of the March 16th incident between the defendant and the victim until she read the court report in Saturday's newspaper (Tr. 713-714).

Bruce Lee called his mother on March 16' 1995, in the afternoon and thought he left a message on the answering machine (Tr. 385). On March 17, 1995, he became concerned when the victim did not return any of his calls (Tr. 386). It was Bruce's wife's birthday, and the victim had not responded to any of Bruce's messages inviting her to their house, nor had the victim called to wish Bruce's wife a happy birthday (Tr. 386). Bruce went to the victim's house between 3:00 - 4:00 p.m. on March 17th, knocked on the door, but did not get a response so he left (Tr. 386-387). The victim's car was in the driveway (Tr. 387).

Bruce again returned to the victim's house later that day, and again knocked on the door, but did not get a response (Tr. 388). He made numerous calls to

family members and to a police officer friend (Tr. 389-390).

The morning of March 18, 1995, Bruce went past the victim's home on his way to work, but did not go up to the house (Tr. 390-391). The cars were parked in the same position as they had been the day before (Tr. 391). More calls were made among family members trying to determine if anyone had spoken to the victim (Tr. 391).

As a result of phone calls from the family, Officer Robert Coggeschall was dispatched to the Putnam Avenue house to ascertain the well-being of the victim (Tr. 292). Coggeschall found all the house's windows and doors were locked (Tr. 294-295). Upon entry into the house by breaking down a frame covering the entrance to the cellar, he found the victim dead in one of the upstairs bedrooms (Tr. 300). During his search of the perimeter, Coggeschall noticed that the wires in the telephone junction box were pulled away from their terminals (T. 315-316). This condition of the wires would cause the person calling the house to hear a ringing at his end of the line, but the call would not ring through to the house (Tr. 6/163). Anyone picking up the phone inside the house would not

get a dial tone (Tr. 6/168). If someone stood outside the house on Thursday night March 16th, and heard the phone ringing inside the house, this meant that the wires had not yet been disconnected (Tr. 6/168-169).

The medical examiner testified that when he first observed the victim, she was lying face-down in a pillow and it appeared as though the body had been moved (Tr. 994). The position of the victim's hand when she was found indicated that she had been moved after death (Tr. 992).

There was a big bruise on the back of the victim's right ankle (Tr. 994). Bruises were caused by blunt force trauma (Tr. 984). A hand or fist, pinching or grabbing something very tightly and crushing the vessels in the skin, would be consistent with blunt force trauma (Tr. 984-985).

The injuries on the victim's face were consistent with having been caused at the time of death, and having been caused by either the face being rubbed into a pillow, or an attempt by the victim to push her mouth and nose away from the pillow (Tr. 1026-1027).

Susan Wilson testified that on September 5, 1993, she was called to the door by a very loud, very quick, frantic banging on the door (Tr. 667). When Wilson

opened the door, she saw the victim standing there (Tr. 667). The victim was "very, very distraught", was asking for help, and was asking for Wilson to call the police (Tr. 668). The victim said she needed help. The defendant had tried to kill her and was choking her, so she ran to Wilson's house (Tr. 688). The victim told Wilson that she had been screaming, the defendant had put a pillow over her face, and she saw her life flash before her eyes (Tr. 668).

At the time the victim told Wilson this, she was very upset and crying (Tr. 669). She was barely dressed, wearing only a spaghetti-strap nightie and no shoes (Tr. 669). Wilson could see what looked like fingerprint marks on the victim's neck (Tr. 669). Wilson called the police, who arrived "right away", in ten minutes or less (Tr. 669).

Officer LaCava observed the victim to be visibly shaken and upset when he responded to Wilson's house (Tr. 648). The victim had a bleeding cut on her nose, and red marks on her face and forearms (Tr. 648).

The defendant admitted to Mashpee Police Officer Christopher Hamilton that he and the victim had had an altercation that night (Tr. 632). Hamilton had been to the house earlier that evening, after the defendant

had reported several firearms had been stolen from his home (Tr. 629). The victim had taken the guns to her mother's house in preparation for an upcoming move (Tr. 650).

The victim's daughter, Susanna Lee, testified to an argument she overheard between the defendant and the victim in September, 1994 (Tr. 700-701). During the summer of 1994, Susanna lived in the basement of the home, where the defendant and the victim also lived, on Putnam Avenue (Tr. 693). During that summer, the defendant was absent from the home for periods of time (Tr. 693). The first and second absences were in June, 1994, and each lasted almost a week (Tr. 695). During the defendant's third absence from the house, he was gone for approximately a month in August, 1994 (Tr. 696). It was after the defendant's return from this third absence that Susanna heard the victim and the defendant arguing upstairs in the kitchen (Tr. 697).

Susanna heard the victim say that the defendant was being irrational and ridiculous, and she was fed up (Tr. 698). The victim described the defendant as dishonest, a liar, and cheating (Tr. 699). She said she had had enough (Tr. 699). The defendant told the

victim that if he could not have her, then no one would (Tr. 699).

Testimony of Dr. William Zane

Doctor Zane testified that he was a medical doctor employed by the office of the chief medical examiner as a forensic pathologist (Tr. 952). He received an undergraduate degree from University of Massachusetts/Amherst, and then received an M.D. degree from the University of Massachusetts/Worcester (Tr. 952). After a year's internship at a community hospital in New Haven, Connecticut, Zane trained in hospital pathology, a specialty of medicine, for three years (Tr. 952). After this training Zane elected to go into the sub-specialty of forensic pathology, and spent a year in training in the office of the chief medical examiner in Baltimore, Maryland (Tr. 952-953).[4]

Forensic pathology was a subspecialty of medicine interested in determining a cause and manner of death (Tr. 953). At the time of trial, Dr. Zane had performed at least 2,000, but closer to 2,500, autopsies (Tr. 953). Doctor Zane performed the autopsy of the victim in this case (Tr. 954).

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[4] At this point in Dr. Zane's testimony, trial counsel stipulated to Dr. Zane's qualifications as an expert (Tr. 953).

Doctor Zane arrived on-scene at approximately 7:40 p.m; he pronounced the victim dead at 7:43 p.m. (Tr. 954). Doctor Zane first observed the victim lying on the bed with just her hair exposed; she was covered by a blanket (Tr. 954). Smothering would be uncomfortable, and in a healthy adult, there would be a considerable amount of activity and struggling (Tr. 991-992). The victim was 5'9" tall and her weight was estimated at 140 lbs. (Tr. 961). The body was prone, lying face down, with the face at a slight oblique angle (Tr. 965). The hands and the arms were by the victim's sides with the palms up (Tr. 965). The position of the hands indicated to Zane that there was a very good chance that the victim was moved after death (Tr. 965). Chips found in the victim's fingernail polish were consistent with an attempt by the victim to free her airway from the pillow (Tr. 1027).

Doctor Zane testified that the cause of death was asphyxia due to smothering (Tr. 987). The victim had 17 injuries on her body, inflicted contemporaneously and within minutes of the time of death (Tr. 969, 981-982). The injuries suffered by the victim in and around the time of death were consistent with asphyxia

due to smothering (Tr. 1020-1021). Petechial hemorrhages indicative of asphyxia due to smothering were present on the victim's windpipe and on the surface of her right lung (Tr. 988). The doctor testified that inhaler use "absolutely did not" cause the victim's death, and her heart was perfectly normal (Tr. 1019).

Zane opined that the time of the victim's death was 24 - 48 hours, but more toward the 36-hour range, before he pronounced the victim dead on March 18, 1995 at 7:43 P.m. (Tr. 1033). The outside limit of time of death would be 8:00 p.m. on Thursday, March 16th (Tr. 1033). The most likely time of death was from 11:00 p.m. Thursday to 6:30 a.m. on Friday, March 17th (Tr. 1034). At the time of autopsy, the medical examiner ruled out natural causes as the cause of death (Tr. 1018-1019). He specifically ruled out cardiac arrhythmia as the cause of the victim's death, based upon his autopsy examination (Tr. 1019). In addition, physical injuries on the victim pointed to asphyxia, and a struggle before the victim died (Tr. 984-992, 1026-1027).

When her body was turned face up, Zane noted injuries to her face of some significance (Tr. 957).

There was 1/16" abrasion on the upper right eyelid, a 1/8" abrasion on the front of the right ear, and a 1/4" abrasion at the angle of the right jaw (Tr. 969-970).

There were injuries to both side of the victim's face (Tr. 1026). The fact that there was no evidence of healing was consistent with them having occurred at or about the time of death (Tr. 1027). The fact that there were injuries to the face was consistent with the victim's face being rubbed into a pillow, or the victim attempting to push a pillow away from her nose and mouth, and in the process scraping herself (Tr. 1026-1027).

There were other injuries to the victim. While there were no breaks to her fingernails, the nail polish was chipped on the first and third fingers of the both the left and right hands (Tr. 972).

There was a 2" hemorrhage on the right arm (Tr. 970). There was a purple contusion between the second and third fingers on the dorsum of the right hand, with a hemorrhage underneath (Tr. 970). There was a hemorrhage and abrasion on the ulnar aspect of the right wrist (Tr. 970). There was a 3/4" hemorrhage in the area adjacent to the second and third fingers (Tr.

971). There was a hemorrhage on the radial aspect of the right wrist (Tr. 971).

There was a hemorrhage, underneath or adjacent, to the victim's left thumb (Tr. 971). There was a 1/8" abrasion at the base of the left thumb (Tr. 971). There was an area of bruising at the base of the left wrist, and a 1/8" abrasion there as well (Tr. 971). The radial aspect of the victim's left wrist had an underlying area of hemorrhage (Tr. 971-972).

The right leg had an area of hemorrhage midway between the knee and the thigh (Tr. 972-973). The left thigh had 1" and 2" areas of hemorrhage under the skin (Tr. 973). There was a contusion measuring 3" by 1" at the back of the victim's right ankle (Tr. 973).

Zane made incisions to determine the injuries (Tr. 975-976). Sectioning and microscopic examination allowed him to make a determination that the injuries had not begun to heal, therefore the injuries occurred contemporaneously with the time of death (Tr. 976).

There was a mark on the right side of the nose that was consistent with an abrasion (Tr. 979). It was an acute hemorrhage (Tr. 979). There was an acute hemorrhage in the subcutaneous area of the left hand (Tr. 979).

There was an acute subcutaneous hemorrhage in the skin of the right hand (Tr. 980). The right arm had an acute hemorrhage in the dermis and subcutaneous layers (Tr. 980). The left wrist had an acute hemorrhage in the subcutaneous and dermis layers (Tr. 980-981). The right wrist had a subcutaneous hemorrhage (Tr. 981).

Zane sectioned eight of the wounds and examined them (Tr. 977). One of the injuries sectioned was the right ankle (Tr. 977). It looked fresh, and it was acute (Tr. 978). There was no disease or any other condition (Tr. 978). The injury had bled into the area (Tr. 978). There was no pattern of lividity on the ankle; it was a true bruise, a contusion (Tr. 979).

The eight injuries sectioned appeared fresh, and not all were in prominences of the body (Tr. 981). They all had occurred within and around the same time (Tr. 981). These injuries most likely occurred within minutes in and around the time of death (Tr. 982). The hemorrhages indicated that the injuries were no more than minutes old, up to 45 minutes old, before death (Tr. 982). But they all appeared to have been inflicted in and around the time of death (Tr. 982).

In Zane's opinion, the injuries to the left hand did not occur in the normal course of events (Tr. 983). Neither did the injury to the back of the ankle (Tr. 984). The injury to the nose was in and around the airway (Tr. 984).

The bruises were caused by blunt force trauma, meaning that something with a smooth surface impacted the skin, or the skin impacted a smooth surface (Tr. 984). This would cause a crushing of the vessels in different layers of skin (Tr. 984). A hand or fist, grabbing something very tightly, or a pinch, was consistent with blunt force trauma (Tr. 984-985). Zane would not agree with defense counsel's question that most people would have several scrapes and bruises in the normal course (Tr. 1014).

It was Zane's opinion that the victim died from asphyxia due to smothering (Tr. 987). There were petechial hemorrhages present, which can be a sign of asphyxial death (Tr. 988). Petechial hemorrhages occurred when there was congestion or lack of oxygen, which caused injury to the cell wall (Tr. 988). The petechial hemorrhages were very small (Tr. 988). They were located on the windpipe right below the

vocal cords and on the surface of the right lung (Tr. 988).

Zane examined the victim's heart and lungs, and the other organs (Tr. 1013). Zane found congestion in the lungs, which was a "soft" finding for asphyxia (Tr. 1014).

Zane testified that asphyxial death was a diagnosis of exclusion, occurring when everything else was ruled out (Tr. 1011-1012). A diagnosis of exclusion was also used when there were certain findings and no other evidence of significant trauma (Tr. 1018). The victim's death was not a diagnosis of exclusion per se (Tr. 1018-1019). Zane made this diagnosis because of the presence of multiple areas of acute trauma in and around the time of death, and the absence of any evidence of natural disease (Tr. 1018-1019). Zane made this diagnosis once he had eliminated most of the other possibilities for the victim's death (Tr. 1012).

Smothering occurred when there was an obstruction of the airways (Tr. 991). It could occur when the airway was blocked by a hand or an object like a pillow (Tr. 991, 992). Smothering could be uncomfortable, causing air hunger, and a considerable

amount of activity and struggle in a healthy adult (Tr. 991-992).

At the time of the autopsy, Zane had not been told of any significant medical problems that the victim had (Tr. 995). There was an inhaler next to the body at the scene (Tr. 996). This inhaler was a prescription item (Tr. 996). An inhaler absolutely did not cause the victim's death (Tr. 1019). Asthma is when mucous developed, plugging the lungs (Tr. 997).

Arrythmias, as well as rapid heartbeat, could be caused by inhaler use (Tr. 999). Zane did not consult a cardiologist or a pulmonary specialist (Tr. 999). Zane did not know of any cardiac problems that involved petechial hemorrhages (Tr. 1017). Enlargement of the heart could result in them, but that was associated with a specific condition (Tr. 1017).

Zane looked at each organ during the autopsy, to help decide if he needed to examine anything microscopically (Tr. 1020). Zane found that the victim's heart was perfectly normal (Tr. 1019, 1020). No heart disease caused her death (Tr. 1019). No natural disease process in her lungs caused her death

(Tr. 1019). There was no disease process in either her liver or her kidneys (Tr. 1019). Nothing in the victim's brain showed any cause of death or natural disease (Tr. 1020). A toxicology screen was negative (Tr. 1021). Zane testified that he took random sections of the lungs and liver and found no problems (Tr. 1020).

Zane ruled the victim's death a homicide after the autopsy on March 19, 1995 (Tr. 1017). The diagnosis of asphyxia due to smothering was made after the gross examination, the presence of facial abrasions, petechial hemorrhages on the inner lining of the throat and the lungs, the presence of contusions on the right arm, right thigh, right legs, right ankle, and the presence of contusions and abrasions on the hands (Tr. 1020-1021).

Zane also testified that he spoke with Dr. George Katsas (the defendant's expert) about the case (Tr. 1021).

ARGUMENT

I. BY NOT RAISING THESE ISSUES AT THE EARLIEST POSSIBLE TIME, THE DEFENDANT HAS WAIVED REVIEW OF THEM.

This is the defendant's fourth attempt, overall, to try to reverse his conviction. The defendant

received the special plenary review pursuant to G.L. c. 278, §33E, reserved for first degree murder cases. In addition, the defendant has also had two motions for new trial denied by both the Superior Court and his conviction affirmed by the Supreme Judicial Court, and his gatekeeper motion for the second motion for a new trial denied by the Single Justice of the Supreme Judicial Court.

The jury rejected the defendant's claim that the victim died of natural causes. The Supreme Judicial Court rejected the defendant's claim that the victim died of natural causes. *Snell, supra* at 781. In addition, in its opinion, the Supreme Judicial Court noted that on appeal that the evidence included testimony that the victim had suffered "17 injuries to her body that were inflicted *contemporaneously* or within minutes of the time of her death" (*Snell, supra* at 769 [B/3])(emphasis added).

In his first motion for a new trial, which was consolidated with his main appeal, the defendant claimed ineffective assistance of trial counsel. *Snell, supra* at 779-780 (B/10). In his direct appeal, the defendant already raised the issues he raises now- that the victim may have died of natural causes, and

that the medical examiner failed to conduct tests on an inhaler found by the victim. *See Snell, supra* at 770 (B/4). All claims were rejected by the Supreme Judicial Court in its opinion.

In the defendant's second motion for a new trial, among the defendant's claims was again that the victim's death was not caused by natural causes, but he instead claimed that someone else was the murderer. The defendant's second motion for a new trial again raised issues that had already been rejected by the Supreme Judicial Court in its opinion.

A motion for a new trial may not be used to compel the review of issues on which the defendant has already had appellate review or issues on which the defendant has foregone the opportunity. *Commonwealth v. Balliro*, 437 Mass. 163, 166 (2002). All grounds for relief claimed by a defendant under rule 30 shall be raised by the defendant in his original or amended motion. Any grounds not so raised are waived unless the judge in his discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion. *Balliro, supra* at 166, *quoting Mass.R.Crim.P 30(c)(2)*. Waived claims are reviewed to

determine if they create a substantial risk of a miscarriage of justice. *Commonwealth v. Randolph*, 438 Mass. 290, 294 (2002). Here, any claim that the defendant could have raised, but did not, on direct appeal or in an earlier motion for a new trial is evaluated for error creating a substantial risk of a miscarriage of justice. *See Commonwealth v. Hallet*, 427 Mass. 552, 553-555 (1998); see also *Commonwealth v. Balliro*, 437 Mass. 163, 166 (2002).

II. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

A. The affidavits in support of the defendant's motion, for the reasons listed, supra, do not amount to newly discovered evidence, and the defendant has not met his burden.

The defendant argues that he is entitled to a new trial because the physicians' letters constitute newly discovered evidence. The defendant is not entitled to a new trial because he cannot meet his burden to demonstrate the opinions of Kessler, Frielander, Young, Feigin, and Baden constitute newly discovered evidence.

It has long been held that "[t]he trial judge. . . may grant a new trial at any time if it appears that justice may not have bene done." *Commonwealth v. Chatman*, 473 Mass. 840, 845 (2016), quoting Mass. R.

crim. P. 30(b). "The burden rests on the moving party to prove the facts on which he or she relies in support of the motion." *Id.* at 845-846.

Moreover, "[t]he Commonwealth has an interest in ending litigation once a case has been fully and fairly tried." *Commonwealth v. Grace,* 397 Mass. 303, 307 (1986). "A party seeking a new trial on the ground of newly discovered evidence must overcome this interest in finality by showing both the importance and the newness of that evidence." *Id.* Therefore, a defendant seeking a new trial on the basis of newly discovered evidence must "demonstrate that the evidence was newly discovered, and that it was credible, material, and casts real doubt on the justice of the conviction." *Commonwealth v. Solomonsen,* 50 Mass. App. Ct. 122, 127 (2000).

Evidence is not "newly discovered" if it could "have been reasonably discovered by the defendant or his counsel at the time of trial." *Solomonsen,* 50 Mass. App. Ct. at 127. "The defendant has the burden of proving that reasonable pretrial diligence would not have uncovered the evidence." *Grace,* 397 Mass. at 306; see *Commonwealth v. LeFave,* 430 Mass. 169 (1991); *Commonwealth v. Strickland,* 87 Mass. App. Ct. 46

(2015); *Commonwealth v. Laguer,* 89 Mass. App. Ct. 32 (2016). For the reasons stated below, the defendant has not met this burden.

The information that the defendant's expert witnesses have provided in these affidavits was available to the defendant prior to trial. The defendant made a strategic decision to not use an expert at trial. The information the doctors reviewed in forming their opinion was available to the defendant before trial, and trial counsel made a reasonable decision not to use an expert to challenge the victim's cause of death. Therefore, the three affidavits attached to this motion for a new trial do not qualify as newly discovered evidence warranting a new trial. *See Commonwealth v. Grace,* 397 Mass. at 305.

This case is factually and legally similar to *Commonwealth v. Sena,* 441 Mass. 822 (2004). In *Sena,* at 831-832, the defendant filed a motion for a new trial on the grounds of newly discovered evidence, that the medical examiner in his case had disciplinary proceedings prior to trial. The Court held that the disciplinary proceedings were discoverable at the time of trial, and the defendant cannot contend that the

information was not reasonably discoverable at the time of trial. *Sena*, at 831.

Moreover, *Sena* held that it is well established that newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial. *Commonwealth v. Sena, supra* at 831 (further citations omitted). "Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of of a new trial." *Commonwealth v. Toney*, 385 Mass. 575, 581 (1982). The Court also found that the disciplinary proceedings do not suggest that the doctor was incompetent in forensic pathology. Here, the same set of facts applies- the "disciplinary" proceedings were discoverable, and furthermore, nothing in the evidence suggests that Dr. Zane was "incompetent," or casts any doubt on the justice of the conviction. The *Sena* opinion addresses the defendant's "Brady" allegation, as nowhere in the opinion does the Court hold that the evidence is exculpatory, or even materially relevant. This court should apply the principles set out in *Sena* and decline to find that the proceedings constitute

newly discovered evidence and affirm the defendant's conviction.

The defendant alleges that the affidavit by Kessler contains information regarding Zane that voids the indictment, and requests the indictment be dismissed. The heavy burden to show impairment of the grand jury is borne by the defendant. *Commonwealth v. Lavelle,* 414 Mass. 146, 150 (1993). The Courts do not inquire into the competency or sufficiency of the grand jury. *Commonwealth v. Robinson,* 373 Mass. 591 (1977).

To justify dismissal of an indictment, a defendant must show that "inaccurate or deceptive evidence was given to the grand jury knowingly and in order to obtain an indictment and that the evidence probably influenced the grand jury's determination." *Commonwealth v. Levesque,* 436 Mass. 443, 456 (2002), citing *Commonwealth v. Drumgold,* 423 Mass. 230, 238 (1996).

> "It is not enough for dismissal of an indictment that false or deceptive evidence was presented to the grand jury. Two further elements normally must be shown. First, our cases have required a showing that false or deceptive evidence was given to the grand jury knowingly and for the purpose of obtaining an indictment . . . Second, the defendant must show that the presentation of the false or deceptive evidence probably influenced the grand jury's determination to hand up an indictment. This requires a showing not only that the evidence was material to the question of probable cause but that, on the entire grand jury record, the false or deceptive testimony probably made a difference."

Drumgold, 423 Mass. at 235.

The information the defendant asserts should have been presented to the grand jury is not exculpatory for the reasons discussed, infra, and the defendant has not met his burden to show impairment.

Moreover, the Supreme Judicial Court reviewed this case under G.L. c. 278, §33E review, and stated that the defendant received a fair trial and the jury's verdict was consistent with the evidence that the defendant acted with malice and a fixed purpose to kill his wife.

B. This court must disregard all unsupported allegations made by Dr. Stanton Kessler. Kessler died in 2011, before the defendant filed this motion for a new trial and never signed the affidavit.

Although Dr. Kessler died over a year before the defendant filed this motion for a new trial, the defendant still insisted on using Kessler's unsubstantiated allegations to support his motion. This Court should not consider these allegations. They are not made in the form of an affidavit, yet are clearly made in preparation for litigation. The Commonwealth cannot refute these allegations from a dead man. The Commonwealth cannot examine Kessler to explore his biases, prejudices, and credibility. The affidavit is unsigned.

Because Kessler's allegations amount to only unsupported hearsay, this Court should completely disregard them. Kessler's report is not in the form of an affidavit or attested to in any fashion. It was not prepared with sufficient indicia of reliability or other corroborating circumstances to raise a substantial issue warranting a hearing or an order of discovery. Nor does it contain sufficient credible evidence to cast doubt upon the issue. *See Daniels, supra* at 407, *also citing Commonwealth v. Goodreau*, 442 Mass. 341, 348 (2004) (citation omitted). It contains multiple layers of hearsay, none of which are independently admissible. *See Commonwealth v.*

Caillot, 449 Mass. 712, 721 (2007), *citing Commonwealth v. McDonough*, 400 Mass. 639, 643 n.8 (1987). The Commonwealth will be unable to challenge this hearsay report by a deceased person.

The Supreme Judicial Court issued an opinion on May 9, 2018, in *Commonwealth v. Drayton*, SJC-10667, holding that the affidavit of a dead witness, who wanted to "clear her conscience" after the conviction, was admissible in Court pursuant to *Chambers v. Mississippi, 401* Mass. 284, 302 (1974). The defendant attempts to use the first *Drayton* opinion in *Commonwealth v. Drayton,* 473 Mass. 23 (2015), to apply to the facts at bar.

Drayton I and II are easily distinguishable from the case at hand. While, as previously stated, "[n]ewly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial," *Commonwealth v. Toney,* 385 Mass. at 581, the Court held that the affidavit was admissible as the Commonwealth's case depended on the testimony of a *single witness* and the "newly discovered evidence" contradicts that testimony. See *Cowels,* 470 Mass. at 621 (emphasis added).

Here, there is no "credibility" issue raised by the defendant, it is a difference among experts, and the affidavit does not qualify as "newly discovered evidence," contrary to the defendant's claims. The Kessler report outlines Kessler's difference of opinion as to what should have been done in conducting an investigation into the victim's death in this case. A difference of opinion among expert witnesses is insufficient to grant a motion for a new trial, as it does not qualify as newly discovered evidence. *Commonwealth v. Sena,* 441 Mass. 822 831 (2004) (holding that information discoverable at trial does not warrant a new trial).

The Commonwealth has summed up the medical findings of Dr. Zane in pages 17-21 of its Opposition to the Defendant's Third Motion for a New Trial. As the opposition is quite lengthy, it briefly discusses those extensive injuries to Ms. Lee in the paragraphs below and contrasts them to the statements of the defendant's affidavits. However, this Court is requested to review the detailed testimony of Dr. Zane (952-1040) and the summation in the Commonwealth's Opposition (pp.17-20).

C. Doctor Young's report merely amounts to one expert disagreeing with another expert, and is therefore insufficient to support a motion on for a new trial. In addition, Young goes beyond his expertise in this case.

It is well established that newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial. *Commonwealth v. Sena,* 441 Mass. 822 831 (2004)(further citations omitted). In this case, Young disagrees with Zane's characterizations of injuries and cause of death. This disagreement is insufficient to support a new trial.

Doctor Young submitted a report. It is not in the form of an affidavit, and is clearly made in preparation for litigation. In his report, Young is guilty of the same behavior that he accused Zane of committing. Young minimizes, mischaracterizes, or outright disregards factual evidence from the autopsy that does not support his belief that the victim died from "sudden heart stoppage".

In addition, Young's letter goes far beyond his area of expertise. He opines, without any basis to do so, that because there was no damage or evidence of a struggle in the bedroom or bathroom, therefore this is

not a homicide. The fact that there was no damage to windows, or signs of a break-in, or theft of property is more damning to the defendant, as it points to the fact that someone with a key entered the house with one purpose in mind - to harm the victim - rather than being a stranger who broke in. Young ignores the phone cords being cut outside the home, the oven and burners being left on, and the fact the body was moved. Young ignores the defendant's previous attempt to strangle the victim and his abuse towards her. Young ignores the defendant's anger towards the victim in the days preceding the death.

Contrary to Young's characterization of Zane's testimony, Zane agreed that there would be a struggle if someone were being smothered. Young, however, chooses to disregard and minimize the victim's injuries, because they do not support his theory of sudden heart stoppage, but instead support Zane's diagnosis of smothering.

One of Young's major bases for claiming that there was sudden heart stoppage was that there was no congestion in the lungs. However, Zane testified at trial that he did find congestion in the victim's lungs (Tr. 1014). This is another example of Young

disregarding facts that do not agree with his supposition that the victim died from sudden heart stoppage.

Young also states that there were no bruises and abrasions around the nose and mouth, lip and oral mucosa. There were abrasions on the right side of the nose, abrasion to the right jaw, abrasion to the eyelid, and abrasion to the right ear. (Tr.957, 969-970, 976, 984) In fact, one of the facts supporting Zane's conclusion that it was asphyxia due to smothering was "facial abrasions." (Tr.957, 969-970)

Young disregards and minimizes the injuries to the victim's face, hands, and legs, because they do not support his diagnosis of sudden heart stoppage. The victim had seventeen injuries on her body. (Tr.987) The victim had significant abrasions and bruises to her face, hands, and legs, which supported evidence of a violent struggle as the victim attempt to breathe and extricate herself from the defendant smothering her.

Contrary to Young's characterization, these were evidence of significant injuries. These injuries, listed above, were evidence of significant trauma.

Young criticizes Zane's finding of petechial hemorrhages. However, Young only examined the photographs, and states that the hemorrhages are not visible on the photograph. Aside from merely being a disagreement with Zane over the presence of petechial hemorrhages, Zane testified that he saw the petechial hemorrhages when he physically examined the lungs and the windpipe (Tr. 998). Unlike Young, Zane based his opinion not just on photographs, but on a direct examination of the actual organs.

D. Doctor Baden's report goes beyond his level of expertise, and moreover, it is not newly discovered evidence, simply a disagreement in opinion which does not qualify as newly discovered evidence.

Again, as with Doctor Young, Baden goes beyond his level of expertise as a pathologist. Baden argues that there was no forensic evidence on the pillow or bedding to support a diagnosis of smothering, and indicates that there was no indication of a struggle. Baden states that "adults would fight back. There is no evidence that Ms.[Lee] did." Baden ignores the hair in Ms. Lee's hand, the damaged, chipped nailpolish, the facial injuries from the defendant's jamming her head into the pillow. (Tr.1027, 957, 969-970)

Baden also "The blanket was undisturbed." Baden ignores the fact that the blanket could have been placed on Ms. Lee after she was smothered. Her body was moved after the smothering.

Baden also ignores the bruise on the back of Ms. Lee's ankle, and the evidence that the seventeen abrasions and contusions to her face and body were within one hour of her death. (Tr.957, 969-970, 976) Without any basis- other than "the most common reason" for the "sudden death" of a healthy 52 year old woman is "sudden natural fatal cardiac arrhythmia, Baden asserts that Ms. Lee's death was not due to smothering.

E. Dr. Feigin's affidavit does not qualify as newly discovered evidence, as it rehashes the crime scene and autopsy findings.

Dr. Feigin's report dramatically minimizes the findings of Dr. Zane. Feigin states that Dr. Zane based his conclusions "on petechial hemorrhage on Elizabeth [Lee's] larynx and pleural reflection of the right lung as well as a small number of facial abrasions measuring less than a one quarter of an inch." This is not an accurate representation of Zane's findings, where he outlined the 17 injuries to Lee, including facial injuries, deep bruising, all of

which had not begun to heal upon Zane's autopsy. (Tr.957, 981-982, 987, 976)

Feigin opines that the cause of death is "most likely myocarditis," however offers nothing to support this other than his opinion this is not a strangulation case.

Feigin, like the other physicians in this case, goes beyond his level of expertise and opines that there was no "sign of a struggle." As discussed previously, this is damning to the defendant because not only of his size compared to the victim's size, but because the lack of a struggle signifies that Lee knew the individual who strangled her. Further, this "no sign of a struggle" does not qualify as newly discovered evidence- the jury observed the photographs and investigators testified as to the appearance of the crime scene.

F. Dr. Frielander's report also goes beyond his level of expertise and is completely speculative, not based on facts and direct observations.[5]

Dr. Frielander is not a forensic pathologist. He is a "general pathologist" and "educator." He

[5] The defendant has been unable to provide the Commonwealth with a curriculum vitae of Dr. Frielander.

reviewed the slides in 2012, 18 years after the homicide in 1994. Friedlander clearly mistakenly received slides from a separate case when he reviewed the "recuts" of the slides sent to him.

Frielander's opinion clearly ignores what he does not agree with, and ignores certain facts. He opines, without basis, that this homicide was a "domestic squabble." This is at marked contrast with his observations of "intensely bruised" skin slides. He further states, without explanation or supporting facts, "what I suspect is this. . ." that the victim had a heart condition. Friedlander never examined the heart.

III. THE DEFENDANT CANNOT ESTABLISH A BRADY VIOLATION, WHERE THE "*BRADY*" ARGUMENT IS SPECULATIVE AND BASED SOLELY UPON THE INADMISSIBLE, UNSUPPORTED ALLEGATIONS OF DR. KESSLER.

The defendant provides no support for his *Brady* claim. See *Brady v. Maryland,* 373 U.S. 83 (1963). All he has provided are the allegations, not even in the form of an affidavit, of the deceased Dr. Kessler. The Commonwealth cannot cross-examine Dr. Kessler to determine his credibility, motive, or biases.

The Office of the Chief Medical Examiner ("OCME") is not under the control of the Cape & Islands

District Attorney's Office. The Commonwealth is only required to turn over exculpatory evidence in its possession. *Commonwealth v. Daughtry*, 417 Mass. 136, 143 (1994). This duty to turn over evidence extends to evidence in the prosecution's possession as well as that in the possession of the police who participated in the investigation and presentation of case. *Commonwealth v. Laguer*, 448 Mass. 585, 591 n.21 (2007); *see also Daughtry, supra* at 143; *and Commonwealth v. Daye*, 411 Mass. 719, 734 (1992).

The defendant alleges without basis that the Kessler report information was known to Zane. Again, Kessler is deceased, and the Commonwealth has no way of cross-examining this witness on his unsigned "affidavit," written in 2011, which for the reasons listed supra, do not qualify as newly discovered evidence.

Moreover, the defendant alleges that the Commonwealth should have turned over these alleged disciplinary personnel files due to a discovery motion for "lab procedures" and "expert credentials." The personnel file of a physician at the OCME clearly does not fall under any of those categories.

The defendant is correct that the Commonwealth has an ongoing duty after trial to turn over exculpatory information. However, the Commonwealth is not in possession of the personnel file- it is in the custody of the OCME. Most importantly, this information is not exculpatory. Exculpatory evidence is defined as evidence which might exonerate the defendant. Fishing through the personnel records of Zane, based on unsubstantiated allegations by Kessler, which are not in the possession of the Commonwealth, does not qualify as exculpatory evidence.

The defendant has not met his burden of showing that any exculpatory evidence in the nature of Zane's qualifications existed. Nor has the defendant shown that such evidence would be in the custody and control of the Cape & Islands District Attorney's Office. The defendant cannot succeed on this claim.

IV. THE DEFENDANT CANNOT MEET HIS BURDEN TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL, AND MOREOVER, THIS IS THE THIRD TIME THE DEFENDANT HAS ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL IN POST-CONVICTION PLEADINGS.

A. Standard of Review.

This is the third time the defendant has alleged ineffective assistance of counsel. The Supreme Judicial Court examined the defendant's contentions

under the standard that governs ineffective assistance claims in a case where there has been a conviction of murder in the first degree. See *Commonwealth v. Parker*, 420 Mass. 242, 245-246 (1995). The Court declined to provide relief in his direct appeal, and the Court declined to provide relief when he filed his gatekeeper motion. The defendant now has filed a laundry-list of alleged shortcomings by trial counsel, some of which have been previously addressed and rejected.

It is well-settled that a two-pronged analysis is required to determine whether an act or omission on the part of counsel constitutes ineffective assistance of counsel. *Commonwealth v. Saferian*, 366 Mass. 89 (1974). The first step in the analysis is to determine whether there has been serious incompetency, inefficiency, or inattention of counsel, i.e. behavior that falls measurably below that expected from an ordinary fallible lawyer. *Id.* at 96. The second requirement is that the shortcomings of counsel deprive the defendant of an otherwise available, substantial ground of defense. *Id.* at 96.

The burden is on the defendant to prove that counsel was ineffective. *Commonwealth v. Bannister*,

15 Mass. App. Ct. 71, 75 (1983), *quoting Commonwealth v. Bernier*, 359 Mass. 13, 15 (1971). The defendant must show that he was deprived of an actual, not hypothetical, otherwise available substantial ground of defense. *Commonwealth v. Urena*, 417 Mass. 692, 701 (1994). The defendant's motion is "conspicuously marred" by the lack of appellate counsel to include an affidavit from trial counsel. *Commonwealth v. Thurston*, 53 Mass. App. Ct. 548, 53-554 (2002)

In a capital case, ineffective assistance claims are reviewed pursuant to G. L. c. 278, § 33E, a standard of review applying *Strickland/Saferian*, that is even more favorable to the defendant. *Commonwealth v. Plant*, 417 Mass. 704, 715 (1994). Under that standard of review, the Court does not focus on the adequacy of trial counsel's performance, but rather focuses on "whether there was an error . . . (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." *Commonwealth v. Wright*, 411 Mass. 678, 682.

The defendant has not provided an affidavit from trial counsel. In ineffective assistance claims the court is entitled to draw a negative inference from

the defendant's failure to secure an affidavit from trial or plea counsel. See, e.g., *Commonwealth v. Goodreau,* 442 Mass. 341, 354 (2004) ("[T]rial counsel's failure to confirm either of these points speaks volumes. When weighing the adequacy of the materials submitted in support of a motion for a new trial, the judge may take into account the suspicious failure to provide pertinent information from an expected and available source. *See Commonwealth v. Thurston,* Mass. App. Ct. 548, 553-554, [2002]" [emphasis supplied]). See also *Commonwealth v. Leng,* 463 Mass. 779, 787 (2012); *Commonwealth v. Williams,* 71 Mass. App. Ct. 348, 352, (2008), quoting from Commonwealth v. Thurston, supra ("The defendant's claim in his affidavit that trial counsel was ineffective in his preparation is 'conspicuously marred' by his failure to file an affidavit from his attorney, or . . . even [to] indicate that he sought to obtain an affidavit from counsel" [emphasis supplied]).

Ineffective assistance of counsel is not established merely by showing that trial counsel did not call additional witnesses, or present additional evidence. The defendant must also show that this

additional evidence would have been relevant or helpful. *See Commonwealth v. Ortega*, 441 Mass. 170, 178 (2004).

B. The defendant cannot establish ineffective assistance of his trial expert.

The defendant alleges that his expert retained for trial was ineffective. His trial counsel did not have his expert testify at trial. The defendant has not provided an affidavit from trial counsel, and has not provided an affidavit from the trial expert. This ineffective assistance claim was not raised with the previous claims of ineffective assistance of counsel. This claim is belated and without any sort of factual support.

Notably, the defendant has not cited to a case that the *Strickland/Saferian* standards for ineffective assistance of an attorney should be applied to an expert.

The defendant cites *Commonwealth v. Epps*, 474 Mass. 743 (2016) in support of his argument. This case is factually distinguishable. In *Epps*, the Court addressed the developing research in the scientific foundation of shaken baby syndrome. Here, the defendant does not take issue or allege that there is

a developing science of suffocation. He simply takes issue with the medical expert's findings, which was addressed at trial and in prior motions for a new trial, and reviewed by the Supreme Judicial Court.

The defendant's argument utterly fails to meet the standard of *Strickland,* but is instead an attempt to get a rehearing on this issue already raised and rejected by the Supreme Judicial Court in the appeal-in-chief. A motion for a new trial may not be used as a vehicle to compel reconsideration of an issue on which the defendant has already had his day in court. *Commonwealth v. Gagliardi*, 418 Mass. 562, 565 (1994) ("The attempt to argue failure of appellate counsel is meritless. Indeed, it seems to us that the defendant has already had his day in court as to these issues.")

C. Ineffective assistance of trial counsel.

The defendant alleges that trial counsel was ineffective for failing to develop evidence to "seriously challenge" the Zane autopsy. (D.Mot.63) The defendant also alleges that trial counsel was ineffective for failing to impeach the defendant's neighbor who saw the defendant's truck at the victim's house on the morning of the homicide. (D.Mot.63)

1. Trial counsel was not ineffective for failing to utilize an expert to testify about the autopsy findings by Dr. Zane.

The defendant alleges that his attorney was ineffective for failing to have an expert testify as to the autopsy by Doctor Zane. Ineffective assistance of counsel is not established "merely by showing that the defendant's counsel did not call additional witnesses." *Commonwealth v. Ortega,* 441 Mass. 170, 178 (2004); see *Commonwealth v. Britto,* 433 Mass. 596, 602 (2001) (decision to call witness is tactical judgment that amounts to ineffective assistance of counsel only if manifestly unreasonable when made). With regard to trial counsel's decision as to tactical or strategic decisions, the defendant must show that those decisions were "manifestly unreasonable." *Commonwealth v. Finstein,* 426 Mass. 200, 203 (1997). The burden of establishing ineffective assistance of counsel rests upon the defendant. This is not grounds for ineffective assistance of counsel, as the defendant has not provided an affidavit from his attorney explaining his and her reasons for not utilizing their expert at trial. The defendant must show that the purported testimony would have been relevant or helpful, which he has failed to do because he provided

no affidavits from the alleged witnesses setting forth the testimony they would have given had they been called as witnesses. Commonwealth v. Collins, 85 Mass. App. Ct. 27, 35 (2014), citing Commonwealth v. Scott, there is no way to determine whether the testimony would likely have made a material difference.

In applying the first prong of ineffective assistance of counsel, the defendant cannot show that counsel was inattentive or incompetent. Defense counsel hired an expert to examine the medical reports, which resulted in a "thorough" cross-examination on all the relevant medical evidence and issues, as outlined below. Commonwealth v. Baran, 74 Mass. App. Ct. 256, 277 (2009), citing Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Calling an expert at trial is a tactical decision left to the trial attorney. Moreover, because the questions concerning sudden heart stoppage, issues of the autopsy, cardiology claims, and inhaler issues were addressed through cross-examination, calling an expert on those issues would not have accomplished something meaningful for the defense. Commonwealth v. Drayton, 473 Mass. 23 (2015).

In reviewing the transcript, trial counsel deftly challenged the autopsy findings by Dr. Zane. Trial

counsel forced Zane to admit he did not have the victim's medical records when he did the autopsy, he did not consult with a cardiologist or a pulmonary specialist. Zane did not know the contents of the inhaler. (Tr.996-999) Trial counsel asked Zane about sudden heart stoppage, superventricular tachycardia, and his examination of the heart. Zane stated he did not observe any injuries to Ms. Lee's lips or mouth. Zane stated that the eye injury could come from scratching her eye with her hand, and trial counsel elicited whether the injuries could be from sports. Trial counsel objected when the trial prosecutor attempted to discuss a conversation that Zane had with Dr. Katsas, the defendant's retained expert. The record reflects that in every manner, defense counsel researched their theory of the case- "sudden heart stoppage" or death due to inhaler.

2. Cross-examination of witnesses.

The defendant alleges that his attorney should have cross-examined Mr. Rozen, the neighbor who observed the defendant's car leave his house that morning. The defendant attempts to parse the transcript and argue facts which trial counsel should have elicited or used at cross-examination. This is

not a proper basis for an ineffective assistance claim. *See McGann*, 20 Mass. App. Ct. at 61; *Bernier*, supra at 18-19. Specifically, the defendant compares Rozen's trial testimony to his grand jury testimony, and notes a 15 minute time "discrepancy." Further, the defendant asserts that he should have called a witness to testify to the checkout time form from the hotel. This issue has been addressed in the defendant's appeal-in-chief, and should be deemed waived.

The defendant also alleges that counsel should have explained that the left turn onto Putnam Avenue was inconsistent with the direction of heading to the motel in Hyannis. The defendant also alleges that Rozen was incorrect about the weather that evening. Both of these issues were addressed at trial.

The defendant parsed through the transcript, found minimal inconsistencies, and alleges they are ineffective assistance of counsel. In applying the standard of *Strickland/Saferian*, the defendant has not shown how a claimed mistake in Rozen's memory about the weather would amount to a substantial ground of defense. Further, the defendant ignores the fact that he challenged Rozen's memory of the weather during the

trial, both in cross examination, and the defendant presented his own expert witness who testified the weather was cloudy and rainy on that day. (Tr.1076-1086)

The alleged weaknesses in the trial defense to which the defendant's appellate counsel now alludes are "no more than Monday morning quarterbacking." *Commonwealth v. Almeida*, 34 Mass. App. Ct. 901 (1993). "Invariably the lawyer who fights a campaign on the written word finds ways to fight it better." *Commonwealth v. McGann*, 20 Mass. App. Ct. 59, 61 (1985).

The defendant also alleges that there was no out-of-court or in-court identification by Mr. Rozen, and appellate counsel alleges that defense counsel was ineffective for failing to challenge the identification of a photo in this case. Rozen said he heard the defendant's truck start up, and he observed the defendant driving the truck. (Tr.65-66) Rozen and the defendant were neighbors, had interacted multiple times prior, and Rozen identified a photo of the defendant during trial. Rozen did not identify the defendant in court, he identified a photo of his neighbor. This was not in error and did not violate

Commonwealth v. Crayton, 470 Mass. 228, 242 (2014) (holding that Commonwealth does not need to do an out-of-court identification when making an in-court identification if there is "good reason," i.e. where the witness was familiar with the defendant).

VII. THE DEFENDANT CANNOT ESTABLISH ACTUAL INNOCENCE.

For these same reasons, the defendant's claim that the medical records and the causation opinions established his "actual innocence" is without merit, and the cases upon which the defendant relies are simply inapposite. *See Schlup v. Delo,* 513 U.S. 298, 318-323 (1995) (a showing of actual innocence may excuse an otherwise procedurally defaulted Federal habeas corpus petition). Finally, the defendant invokes on appeal House v. Bell, 547 U.S. 518, 536-537 (2006), arguing that he is actually innocent of the convictions. *House v. Bell* does not support this argument. See *id.* at 536 (holding that a Federal court in a habeas proceeding may consider claims that a State prisoner failed to first raise in State court if the prisoner demonstrates "cause for the default and prejudice from the asserted error").

CONCLUSION

SUPPLEMENTAL EXHIBITS

A. *Commonwealth v. Emory Snell*, BACR1995-46579

B. *Commonwealth v. Emory Snell*, 428 Mass. 766 (1999)

9572CR46579 Commonwealth vs. Snell, Jr., Emory G

Case Type	Indictment
Case Status	Open
File Date	04/19/1995
DCM Track:	I - Inventory
Initiating Action:	MURDER c265 §1
Status Date:	12/17/2012
Case Judge:	
Next Event:	

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/19/1995	Indictment returned (Murder--First Degree)	1	Image
04/20/1995	Notice & copy of indictment sent to Chief Justice, Attorney General and Regional Administrative Justice (G.L. Chapter 212, Section 7)	2	
04/20/1995	Order of the Court and copy of indictment for service on defendant (G.L. Chapter 277, Section 65)	3	
04/21/1995	RE Offense 1:Plea of not guilty		
04/21/1995	Appearance of Deft's Atty: Sandra F Bloomenthal	4	
04/21/1995	Appearance of Deft's Atty: Frederick C Mycock for arraignment only	5	
04/21/1995	Mittimus for continuance issued to Barnstable County Correctional Facility		
04/21/1995	Mittimus for continuance returned with service	6	
04/21/1995	Bail: Defendant held without bail, without prejudice (O'Neill, Justice)		
04/21/1995	Continued to 4/27/1995 for hearing on pre-trial conference--the Court may address the question of bail at this time (O'Neill, Justice)		
04/21/1995	Continued to 8/1995 trial (O'Neill, Justice)		
04/22/1995	Appearance of Deft's Atty: Robert T Bloomenthal	7	
04/27/1995	Appearance of Deft's Atty: Albert C Bielitz Jr	8	
04/27/1995	MOTION by Deft: for bill of particulars; Allowed; one week for compliance (O'Neill, Justice)	9	
04/27/1995	MOTION by Deft: to preserve police transmission and turret tapes; Agreed to if tapes are available (O'Neill, Justice)	10	
04/27/1995	MOTION by Deft: for prima facia evidence; No action (O'Neill, Justice)	11	
04/27/1995	MOTION by Deft: for payment of counsel, experts and expenses with affidavit of counsel in support	12	
04/27/1995	Continued to 6/9/1995 for non-evidentiary hearing (O'Neill, Justice)		
05/02/1995	Pre-trial conference report filed	13	
05/18/1995	Commonwealth files bill of particulars	14	
05/25/1995	MOTION by Deft: for list of persons interviewed	15	
05/25/1995	MOTION by Deft: for the delivery of police telephone and transmission tapes	16	
05/25/1995	MOTION by Deft: for list of persons involved in the investigation	17	
05/25/1995	MOTION by Deft: for disclosure of booking sheets	18	
05/25/1995	MOTION by Deft: for disclosure of criminal, juvenile, arrest, parole and probation records of the victim and Commonwealth's witnesses	19	
05/25/1995	MOTION by Deft: for inspection of hospital records	20	
05/25/1995	MOTION by Deft: for discovery of government's intention to use evidence of prior bad acts	21	

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Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/25/1995	MOTION by Deft: for notification of confidential informants	22	
05/25/1995	MOTION by Deft: to inspect scientific and physical evidence	23	
05/25/1995	MOTION by Deft: in re: scientific evidence expert witnesses	24	
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